Filed 11/23/15 P. v. Cervantes CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. FERNANDO ARROYO CERVANTES, Defendant and Appellant.	F067425 (Super. Ct. No. F10903564) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Houry A. Sanderson, Judge.

Carlo Andreani, under appointment by the Court of Appeal,] for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Larenda R. Delaini, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Fernando Cervantes sexually molested three young girls, including two relatives and a neighbor. He was convicted after a jury trial found him guilty of three counts of committing lewd acts on a child under the age of 14 (Pen. Code,[1] § 288, subd.

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1 Further statutory references are to the Penal Code unless otherwise specified.

(a); counts 1–3). A multiple victim enhancement allegation was found true (§ 667.61, subd. (e)(4)) and Cervantes was sentenced to three consecutive terms of 15 years to life. On appeal, Cervantes contends: (1) the trial court erred in instructing the jury on evidence of his prior uncharged acts of indecent exposure under CALCRIM No. 1191; (2) the court erred in denying his request to instruct the jury on voluntary intoxication under CALCRIM No. 3426; and (3) his sentence of 45 years to life was unauthorized and must be reversed due to a typographical error in the jury verdict form. Finding no merit in these contentions, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND[2]

J.T.1,[3] the victim of count 1, and her sister, J.T.2, the victim of count 2, are related to Cervantes on their father's side of the family. The offenses occurred in 2005, when J.T.1 and J.T.2 were around seven and eight years old and their father took them on visits to a home where Cervantes and other family members lived.

On one occasion, Cervantes motioned to J.T.1 to come outside the house. J.T.1 went outside and sat on the front steps and Cervantes sat below her. Cervantes asked J.T.1 if she wanted to see his "dick." After J.T.1 said no, Cervantes sat her on his lap, put his hand down her pants, and started rubbing her vagina up and down underneath her clothes. He said he had done it to other girls and they had liked it. Cervantes threatened J.T.1 that if she said anything, he would hurt her family.

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2 Evidence not relevant to any issue raised on appeal, including expert testimony about Child Sexual Abuse Accommodation Syndrome, has been omitted from the statement of facts.

3 In this opinion, certain persons are identified by initials, abbreviated names and/or by status in accordance with our Supreme Court's policy regarding protective nondisclosure. No disrespect is intended.

On another occasion, when Cervantes was alone somewhere in the house with J.T.2, he touched her vagina underneath her clothes and showed her his penis. Cervantes told J.T.2 not to tell and that he would hurt her if she did.

During the same timeframe as when Cervantes molested J.T.1 and J.T.2 (i.e., 2005), Y.A., the victim of count 3, was around 10 years old and lived across the street from the house where Cervantes lived. Cervantes's brother, Ray, who was just a little older than Y.A., also lived there. One day, Cervantes invited Y.A. into his bedroom to play videogames with him and Ray. Y.A. sat on the bed and played a videogame for a while and then gave the controller to Ray.

When Ray started playing the video game, Cervantes told Y.A. to open her legs and show him her "pussy." Although she said no, he said it about five more times. Cervantes then took out his penis and made Y.A. touch it. After putting his penis away, Cervantes forced Y.A.'s legs apart, pulled her underwear to the side, and touched her vagina with his tongue.

Cervantes stopped when his wife, Maricela, came into the bedroom. Y.A. was crying and Maricela asked her if she was okay. Cervantes responded, "Just leave her alone. She's a cry baby." Y.A. never told anyone what happened at the time because Cervantes threatened that something bad was going to happen to her and her family if she did.

Sometime in 2005, J.T.1 and J.T.2 told a five-year-old cousin that Cervantes had touched them. After the cousin told his father, the sheriff's department was contacted and the sisters were taken to the sheriff's department to be interviewed. Cervantes was also interviewed by a sheriff's deputy. During the interview, Cervantes did not admit to any inappropriate touching of the victims.

In July 2010, after Y.A. reported to one of her teachers that she had been sexually abused, a detective interviewed Cervantes. Cervantes initially denied molesting the victims. However, he eventually admitted that he had shown them his penis. Finally,

near the end of the interview, Cervantes generally admitted all the victims' allegations against him were true, not just their allegations that he had shown them his penis. Cervantes further admitted that, during the same time period of the victims' abuse, he showed his penis to J.T.1's and J.T.2's cousin, A.C., who was around six years old at the time.

The defense challenged the credibility of prosecution witnesses, primarily by emphasizing evidence of prior inconsistent statements they had made. The defense also called Cervantes's brother and cousin to testify regarding his good character for honesty and truthfulness.

DISCUSSION

I. The trial court properly instructed the jury under CALCRIM No. 1191.

The trial court admitted evidence that Cervantes committed a number of prior, uncharged sexual offenses pursuant to Evidence Code section 1108, including evidence of two separate incidents of indecent exposure. In one incident, which occurred when J.T.2 was younger than eight years old, Cervantes pulled out his penis and told J.T.2 to look at it. At the time, he was sitting on a low brick wall outside the house. In another incident, which occurred around 2005, J.T.1's and J.T.2's then six-year-old cousin, A.C., was outside playing by herself in the backyard, when Cervantes took out his penis and showed it to her.

Regarding these incidents and the other Evidence Code section 1108 evidence introduced at trial, the trial court instructed the jury under CALCRIM No. 1191, as follows:

> "The People presented evidence that the defendant committed the crime of Indecent exposure and other lewd and lascivious acts that were not charged in this case.…
>
> "You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offense. Proof by a preponderance of the evidence is a different

> burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.
>
> "If the People have not met this burden of proof, you must disregard this evidence entirely.
>
> "If you decide that the defendant committed the uncharged offenses, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit and did commit counts 1, 2 and 3, as charged here. If you conclude that the defendant committed the uncharged offense, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of counts 1, 2 and 3 as charged here. The People must still prove each charge and allegation beyond a reasonable doubt."

On appeal, Cervantes emphasizes that he is not challenging the trial court's admission of the Evidence Code section 1108 evidence, including the prior incidents of indecent exposure, nor is he claiming "the pattern CALCRIM No. 1191 is facially erroneous or per se unconstitutional." Instead, he claims the court erred in referencing the prior acts of indecent exposure in the instruction because "the indecent exposure was so dissimilar to the lewd act charges to not logically permit a speculative predisposition inference and the instruction."

Cervantes does not explain specifically how his prior acts of indecent exposure against J.T.2 and A.C. were so dissimilar to the charged offenses that they did not have probative value as propensity evidence. Instead, his argument appears to rely heavily on *People v. Earle* (2009) 172 Cal.App.4th 372 (*Earle*). In *Earle*, the defendant was charged with two separate crimes—indecent exposure and assault to commit rape—involving two different victims. The defendant moved to sever the charges for trial, arguing that a joint trial would be prejudicial. The trial court denied the motion, and the defendant appealed. (*Id.* at pp. 384–385.)

The Court of Appeal, in a two-to-one decision, reversed the assault conviction, concluding the trial court abused its discretion in denying the motion to sever because, absent expert testimony to the contrary, the commission of the indecent exposure did not rationally support an inference that the perpetrator had a propensity or predisposition to commit rape. (*Earle, supra,* 172 Cal.App.4th at p. 398.) The *Earle* court reasoned: "[A] propensity to commit one kind of sex act cannot be supposed, without further evidentiary foundation, to demonstrate a propensity to commit a different act. The psychological manuals are full of paraphilias, from clothing fetishes to self-mutilation, some of which are criminal, some of which are not. No layperson can do more than guess at the extent, if any, to which a person predisposed to one kind of deviant sexual conduct may be predisposed to another kind of deviant sexual conduct, criminal or otherwise. Is one who commits an act of necrophilia (Health & Saf. Code, § 7052) more likely than a randomly selected person to commit an act of rape? Child molestation? Indecent exposure? Is a pedophile more likely than a rapist or a member of the public to commit necrophilia? Without some evidence on the subject, a jury cannot answer these questions." (*Earle, supra,* at p. 399, italics omitted.)

To the extent Cervantes interprets *Earle* as categorically concluding that evidence of a defendant's propensity to commit indecent exposure, without expert testimony, is irrelevant to prove the defendant's propensity to a commit a different sexual offense, we disagree with this conclusion. As we shall explain, such conclusion finds no support in the plain language of Evidence Code section 1108, its Legislative history, or case law interpreting the statute, and is contrary to the purpose of the statute's enactment.

As set forth above, Evidence Code section 1108 renders admissible in the trial of a sexual offense evidence of a defendant's commission of "*another sexual offense*"—i.e., a crime involving "*any of*" the enumerated crimes. (Italics added.)[4] The Legislature could

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[4] Evidence Code section 1108, subdivision (d) defines "'[s]exual offense'" as a crime that involved "[*a*]*ny conduct* proscribed by Section 243.4 [sexual battery], 261 [rape], 261.5

have easily limited the evidence admissible under Evidence Code section 1108 to "another *similar* sexual offense or offenses" had it so intended. Because Evidence Code section 1108 does not contain any such limiting language, we must presume that the Legislature did not intend such a limitation. (E.g., *Soto v. State of California* (1997) 56 Cal.App.4th 196, 202 [rejecting plaintiff's contention that the immunity provided by Government Code section 8655 applied only in an emergency: "If the Legislature had intended to so limit the scope of the section, we presume it would have said so"].)

The legislative history of the statute supports our conclusion. The author of Evidence Code section 1108 reported: "'At the hearing before the Judiciary Committee, there was discussion whether more exacting requirements of similarity between the charged offense and the defendant's other offenses should be imposed. *The decision was against making such a change*, because doing so would tend to reintroduce the excessive requirements of specific similarity under prior law which [Assembly Bill No.] 882 is designed to overcome, ... and could often prevent the admission and consideration of evidence of other sexual offenses in circumstances where it is rationally probative. Many sex offenders are not "specialists," and commit a variety of offenses which differ in

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[unlawful sexual intercourse with a minor], 262 [rape of a spouse], 264.1 [rape in concert with another], 266c [unlawful sexual intercourse, sexual penetration, oral copulation, or sodomy], 269 [aggravated sexual assault of a child], 286 [sodomy], 288 [lewd acts on a child under 14 years], 288a [oral copulation], 288.2 [distributing matter depicting minors engaging in sexual activity], 288.5 [continuous sexual abuse of a child], or 289 [forcible sexual penetration], or subdivision (b), (c), or (d) of Section 311.2 [distributing obscene matter] or Section 311.3 [sexual exploitation of a child], 311.4 [employing a minor to distribute obscene matter], 311.10 [advertising obscene matter depicting a minor], 311.11 [possessing matter depicting minor engaging in sexual conduct], 314 [indecent exposure], or 647.6 [annoying or molesting a minor]," or "[a]ny conduct proscribed by Section 220 of the Penal Code [assault with intent to commit rape, sodomy, or oral copulation]," or "[c]ontact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person," or "[c]ontact, without consent, between the genitals or anus of the defendant and any part of another person's body," or "[d]eriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person," *or* "[a]n attempt or conspiracy to engage in conduct described in this paragraph." (Italics added.)

specific character.'" (Historical and Statutory Notes, 29B pt. 3B West's Ann. Evid. Code (2009 ed.) foll. § 1108, p. 352, italics added.)

In *Falsetta, supra,* 21 Cal.4th 903, a constitutional challenge to Evidence Code section 1108, the California Supreme Court concluded that admitting evidence of a defendant's other sexual offenses does not offend due process because, among other things, such offenses are highly relevant to a defendant's propensity to commit other sexual offenses. The court noted that in enacting Evidence Code section 1108, the Legislature had expanded the admissibility of disposition or propensity evidence in sex offense cases "to assure that the trier of fact would be made aware of the defendant's other sex offenses in evaluating the victim's and the defendant's credibility." (*Falsetta,* at p. 911.) Such expansion was appropriate because of the relevance of the other offense evidence: "Although defendant disputes the point, the case law clearly shows that evidence that he committed other sex offenses is at least circumstantially relevant to the issue of his disposition or propensity to commit these offenses. As noted in [*People v.*] *Alcala* [(1984) 36 Cal.3d 604], 'Such evidence' is [deemed] objectionable, not because it has no appreciable probative value, *but because it has too much*."'" (*Falsetta*, *supra*, at p. 915, some italics omitted.)

In *People v. Loy* (2011) 52 Cal.4th 46 (*Loy*), the California Supreme Court expanded its holding in *Falsetta* to permit the introduction of evidence of prior sexual offenses under Evidence Code section 1108 even where the defendant contended that the prior and charged crimes were not similar and, therefore, the commission of the first was not probative of the defendant's propensity to commit the second. In *Loy*, the defendant was convicted of the 1996 murder (while engaged in a lewd and lascivious act) of his 12-year-old niece. At trial, the prosecution presented evidence that in 1975 and again in 1981, the defendant had been convicted of rape, oral copulation, and sodomy of two women, ages 16 and 32. (*Loy,* at pp. 54–55.) The defendant contended the trial court erred in admitting this evidence because the prior crimes—raping two women to whom

he was not related—were not similar to the charged crime, murdering his 12-year-old niece.

The *Loy* court disagreed, explaining that, even if the crimes were not similar, that fact "is not dispositive. Before [Evidence Code] section 1108 was enacted, Evidence Code section 1101 governed the admission of prior criminal conduct, and a body of law developed concerning how similar the prior conduct had to be to the charged crime; the required degree of similarity varied depending on the use for which the evidence was offered. [Citation.] 'All of that radically changed with respect to sex crime prosecutions with the advent of section 1108.... [S]ection 1108 now "permit[s] the jury in sex offense ... cases to consider evidence of prior offenses *for any relevant purpose*" [citation], subject only to the prejudicial effect versus probative value weighing process required by [Evidence Code] section 352.' [Citation.] 'In enacting Evidence Code section 1108, the Legislature decided evidence of uncharged sexual offenses is so uniquely probative in sex crimes prosecutions it is presumed admissible without regard to the limitations of Evidence Code section 1101.' [Citation.] Or, as another court put it, '[t]he charged and uncharged crimes need not be sufficiently similar that evidence of the latter would be admissible under Evidence Code section 1101, otherwise Evidence Code section 1108 would serve no purpose. *It is enough the charged and uncharged offenses are sex offenses as defined in section 1108*.'" (*Loy, supra,* 52 Cal.4th at p. 63, last sentence italics added.) Thus, although the defendant's previous sexual offenses may not have been sufficiently similar to be admissible under Evidence Code section 1101, they nonetheless were admissible under Evidence Code section 1108. (*Loy,* at p. 63; see *People v. Story* (2009) 45 Cal.4th 1282, 1293 [prior sexual offense evidence is "particularly probative" in sex cases].)

Furthermore, requiring expert testimony to establish the relevance of different sexual offenses to one another in every case would undermine Evidence Code section 1108's underlying policy of making evidence of other sexual offenses more easily

admissible in subsequent sexual offense prosecutions. As our Supreme Court has explained, Evidence Code section 1108 "was intended in sex offense cases to *relax* the evidentiary restraints [Evidence Code] section 1101, subdivision (a), imposed, to assure that the trier of fact would be made aware of the defendant's other sex offenses in evaluating the victim's and the defendant's credibility." (*Falsetta, supra,* 21 Cal.4th at p. 911, italics added.) The "Legislature's principal justification for adopting [Evidence Code] section 1108 was a practical one: By their very nature, sex crimes are usually committed in seclusion without third party witnesses or substantial corroborating evidence. The ensuing trial often presents conflicting versions of the event and requires the trier of fact to make difficult credibility determinations. Section 1108 provides the trier of fact in a sex offense case the opportunity to learn of the defendant's possible disposition to commit sex crimes." (*Falsetta,* at p. 915.)

Here, Cervantes's prior uncharged acts of indecent exposure (§ 314) and the charged lewd acts (§ 288) are conduct within the express language of Evidence Code section 1108 and, therefore, the indecent exposure evidence was presumptively probative under the above authorities. Moreover, the uncharged and charged crimes share important similarities. The uncharged acts of indecent exposure were probative of Cervantes's propensity to opportunistically commit sexual offenses against young female relatives and acquaintances he encountered at home. Because Cervantes's uncharged offenses were relevant and probative to the present case, the trial court properly included references to his prior acts of indecent exposure in its instruction to the jury under CALCRIM No. 1191, which undisputedly contains a correct statement of law regarding how a jury is to evaluate evidence admitted under Evidence Code section 1108.

II. The trial court properly declined to instruct the jury on voluntary intoxication.

Cervantes contends the trial court erred in declining his request to instruct the jury on voluntary intoxication pursuant to CALCRIM No. 3426.[5] Cervantes claims "[t]he evidence supported reasonable inferences that he was voluntarily intoxicated, drunk on beer (and other liquors), and high on drugs, which negated his specific intent, i.e., he mistakenly touched without intent to arouse or gratify."

Cervantes's contention rests on the following references to his being intoxicated in J.T.1's interview in 2005, and in his own interview in July 2010.

During her interview in 2005, J.T.1 stated that "the second time [Cervantes] did it to me" she felt that "he's drunk." Asked how she knew Cervantes was drunk, J.T.1 explained that, when she was sitting on his lap, she saw him smoking and drinking beer. Asked what kind of beer he was drinking, she replied, "the regular kind of beer."

Cervantes's own references to being under the influence of drugs or alcohol appear in the following excerpts taken from his July 2010 interview:

> "[Q.]: Alright. Well explain it to me. Explain how you're sorry. How sorry are you?
>
> "[A.]: I'm sorry I was born.
>
> "[Q.]: And why is that? Look, we're gonna go out here, my supervisor is gonna ask me what I think. He's gonna ask her what she thinks. Your … mother's still alive?
>
> "[A.]: Um hmm, she was here today.
>
> "[Q.]: She's gonna ask. What we tell your mother? That he has no remorse? That he doesn't care about these girls? Or do we tell 'em inside

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5 CALCRIM No. 3426 states, in part: "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted [or failed to do an act] with <insert specific intent or mental state required ….>. [¶] A person is voluntarily intoxicated if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect."

you have a heart that wants to be truthful? What do we tell them? Explain it to me. Explain it to me. Tell me how you want to redeem yourself. What do I tell them when we walk out? Are you a monster?

"[A.]: No. That's what you guys think though.

"[Q.]: Well explain your mistake. If you explain it, if you tell us you're just a person who made a mistake and you explain that mistake[.]

"[A.]: *I was on drugs.*

"[Q.]: You were on drugs? That explains the mistake?

"[A.]: And it's [(i.e., sexual molestation)] been done to me.

"[Q.]: It's—Are you saying that it's alright then?

"[A.]: No, it probably 'cause it was done to me but I was I don't know trying to hurt other people but I didn't wanna hurt no one." (Italics added.)

"[Q.]: You knew what you were doing was wrong. To [J.T.1] and [Y.A.]

"[A.]: Yes.

"[Q.]: Kay explain that.

"[A.]: Well 'cause it's wrong.

"[Q.]: Yeah but explain what happened.

"… Is that true what [Y.A.] told me?

"[A.]: Not the touching part, none of that. Just that I tried to show her whatever. *I don't know 'cause it was 'cause I was drunk or I don't know*." (Italics added.)

"[Q.]: …Why'd you do it [(i.e., show Y.A. his penis)]? Why'd you do it?

"[A.]: '*Cause I was on drugs or*." (Italics added.)

"[Q.]: Do you need help? Do you need counseling? Do you need therapy?

"[A.]: Not anymore 'cause I won't do that. I haven't you know. [¶] … [¶]

"[Q.]: What changed? Why won['t] you do it anymore? Why would you do it then and you won't do it now?

"[A.]: Well 'cause it's not right. No.

"[Q.]: But that's an important question. People are gonna wanna know. Why did you do it then and why won't you do it now?

"[A.]: '*Cause then I was on drugs*, I was stupid." (Italics added.)

Section 288, subdivision (a) requires "'the specific intent of arousing, appealing to, or gratifying the lust of the child or the accused.'"[6] (*People v. Warner* (2005) 39 Cal.4th 548, 556, italics omitted.) "Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent …." (§ 29.4, subd. (b).) Voluntary intoxication may negate the existence of a specific intent. (*People v. Williams* (1997) 16 Cal.4th 635, 677 (*Williams*).)

A trial court need not give a voluntary intoxication instruction where there is insufficient evidence the defendant's intoxication affected his ability to formulate the requisite intent. (See *Williams, supra*, 16 Cal.4th at p. 677 ["no evidence at all that voluntary intoxication had any effect on defendant's ability to formulate intent" where "defendant was 'probably spaced out' on the morning of the killings" and told the "police that around the time of the killings he was 'doped up' and 'smokin' pretty tough then'"]; *People v. Marshall* (1996) 13 Cal.4th 799, 847–848 [defendant was intoxicated but evidence of the effect on his state of mind was lacking]; *People v. Ramirez* (1990) 50 Cal.3d 1158, 1181 [no substantial evidence defendant's "beer drinking had any noticeable effect on his mental state or actions" where "[d]efendant purported to give a

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6 Section 288, subdivision (a) provides, in relevant part: "any person who willfully and lewdly commits any lewd or lascivious act … upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison."

detailed account of" the incident]; *People v. Simpson* (1987) 192 Cal.App.3d 1360, 1370 [record did not suggest the defendant "was so intoxicated that he could not entertain a specific intent to inflict great bodily injury"].)

As in the above cases, Cervantes was not entitled to a voluntary intoxication instruction because there was no evidence he was so intoxicated that he was unable to form the specific intent required by section 288, subdivision (a). During her interview in 2005, then seven-year-old J.T.1 did not describe any specific behaviors indicating Cervantes's state of mind was affected by intoxication when he molested her. In explaining why she thought he was drunk, she simply said she saw him smoking and drinking a beer when she was sitting on his lap. J.T.1's statements did not establish what effect, if any, Cervantes's beer drinking had on his mental state or support the inference he asserts on appeal; i.e., that he was so intoxicated that he *mistakenly* touched her, without the requisite intent, when he put his hands inside her pants, rubbed her vagina up and down, and said he had done it to other girls and that they had liked it. We see nothing either in J.T.1's interview statements or her trial testimony indicating that Cervantes's purported intoxication affected his ability to formulate the requisite intent of arousing, appealing to, or gratifying the lust of the child or himself.

Likewise, Cervantes's interview statements did not constitute substantial evidence that he was so intoxicated he could not entertain the requisite specific intent. Cervantes merely offered being drunk or under the influence of drugs as one of a few different excuses for his overall behavior, without relating the excuse to any of the specific instances of abuse about which he was being questioned or indicating he was unable to form the required mental state during those instances. Because the record does not disclose substantial evidence supportive of a voluntary intoxication defense, the trial court did not err by declining Cervantes's request to instruct the jury under CALCRIM No. 3426.

III. The error in the verdict form did not result in an unauthorized sentence.

Cervantes contends that his total sentence of 45 years to life, which was enhanced based on the jury's multiple victim finding (§ 667.61, subd. (e)(4)),[7] was unauthorized and must be reversed due to a typographical error in the jury verdict form, which resulted in the jury finding he committed a lewd act against "more than *on* victim" instead of more than *one* victim. (Italics added.)

"A verdict is to be given a reasonable intendment and be construed in light of the issues submitted to the jury and the instructions of the court. It must be upheld when, if so construed, it expresses with reasonable certainty a finding supported by the evidence." (*People v. Radil* (1977) 76 Cal.App.3d 702, 710.) "The form of a verdict is immaterial provided the intention to convict of the crime charged is unmistakably expressed." (*People v. Mackabee* (1989) 214 Cal.App.3d 1250, 1256.) "[T]echnical defects in a verdict may be disregarded if the jury's intent to convict of a specified offense within the charges is unmistakably clear, and the accused's substantial rights suffered no prejudice." (*People v. Webster* (1991) 54 Cal.3d 411, 447, fn. omitted.) "The verdict is insufficient only 'if it be susceptible of a different construction than that of guilty of the crime charged.'" (*People v. Jones* (1997) 58 Cal.App.4th 693, 711.) The same rules apply to a finding on a sentence enhancement allegation. (*Ibid*.)

"[T]he jury's function [is] to find whether the *facts* necessary for conviction [have] been proven, by assessment of the evidence admitted at trial in light of the court's instructions defining the type and quanta of facts necessary for conviction. The verdict,

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[7] Section 667.61 provides, in pertinent part: "(b) … any person who is convicted of an offense specified in subdivision (c) under one of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for 15 years to life. [¶] (c) This section shall apply to any of the following offenses: [¶] … [¶] (8) Lewd or lascivious act, in violation of subdivision (a) of Section 288. [¶] … [¶] (e) The following circumstances shall apply to the offenses specified in subdivision (c): [¶] … [¶] (4) The defendant has been convicted in the present case or cases of committing an offense specified in subdivision (c) against more than one victim."

culminating this process, [is] the jury's statement whether it [has] or [has] not found those facts.' [Citation.] '[T]he function of the verdict is to register the jury's determination of whether the evidence sufficiently establishes the facts that the instructions recite are necessary to conviction.' [Citation.] There is no need in this factfinding process for the enumeration in the verdict of all of the elements of the offense or enhancement. Where the jury is fully instructed as to each element of a sentence enhancement, it is not necessary that the verdict enumerate each of those elements." (*People v. Chevalier* (1997) 60 Cal.App.4th 507, 514.)

By finding Cervantes guilty on each count, the jury necessarily made certain factual findings. By finding Cervantes guilty on counts 1 through 3, the jury necessarily found that he committed lewd acts against three different victims. Thus, the jury essentially found that Cervantes committed lewd acts on more than one victim within the meaning of the multiple victim enhancement allegation. Furthermore, Cervantes's substantial rights suffered no prejudice. He was apprised of the allegation in the information, the jury was fully instructed on it,[8] and the evidence overwhelmingly supported a true finding on it. The verdict is not susceptible to an interpretation that the jury understood the erroneous phrase "more than on victim" in the verdict form to mean something different than "more than one victim."

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8 In this regard, the trial court told the jury, "[i]f you find defendant guilty of two or more sex offenses, as charged in Counts 1, 2 & 3, you must then decide whether the People have proved the additional allegation that those crimes were committed against *more than one victim*." (See CALCRIM No. 3181; italics added.) The accurate jury instruction was reinforced by the prosecutor's closing argument, which addressed "[t]he allegation of multiple victims" by quoting the forgoing language from CALCRIM No. 3181 and explaining: "Basically, that there was *more than one victim*. That's what that says." (Italics added.)

DISPOSITION

The judgment is affirmed.

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HILL, P.J.

WE CONCUR:

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POOCHIGIAN, J.

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FRANSON, J.